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Filing date: **06/14/2016**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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|------------------------|---|
| Proceeding | 86433525 |
| Applicant | Burlington Merchandising Corporation |
| Applied for Mark | BLUSH FOR HER |
| Correspondence Address | KARL S SAWYER JR NELSON MULLINS RILEY & SCARBOROUGH LLP 100 N TRYON ST CHARLOTTE, NC 28202-4000 UNITED STATES ip@nelsonmullins.com,donna.millard@nelsonmullins.com,karl.sawyer@nelsonmullins.com |
| Submission | Reply Brief |
| Attachments | Reply Brief BLUSH FOR HER 86433525.pdf(1200206 bytes) |
| Filer's Name | Karl S. Sawyer, Jr. |
| Filer's e-mail | donna.millard@nelsonmullins.com,karl.sawyer@nelsonmullins.com,ip@nelsonmullins.com |
| Signature | / Karl S. Sawyer, Jr. / |
| Date | 06/14/2016 |

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re US Trademark Application of:

Burlington Coat Factory Warehouse Corporation

Serial No.: 86/433,525

Filing Date: October 24, 2014

Mark: BLUSH FOR HER

Law Office: 102

Examining Attorney:
Lyndsey Kuykendall

Appeal Filed: February 26, 2016

Applicant's Reply Brief

The Examining Attorney's Appeal Brief misinterprets and mischaracterizes Applicant's position on appeal.

At p. 2 of her Brief, the Examining Attorney states that "A certificate of registration is not prima facie evidence that future applications should be approved. Furthermore, during ex parte prosecution, an applicant will not be heard on matters that constitute a collateral attack on the cited registration" Applicant has neither asserted that the two prior registrations are "prima facie evidence that [the current mark] should be approved" nor is Applicant collaterally attacking the cited registrations. Quite the contrary, Applicant's point is that the cited registrations are prima facie valid and, consistent therewith, must therefore be construed and applied in a way that recognizes and supports their validity.

Applicant is grateful that the Examining Attorney has withdrawn Registration No. 4,081,295 as an asserted bar to registration of the applied-for mark. Nevertheless, the withdrawn

registration is no less relevant to the determination of this case, as the question of likely confusion is not evaluated in a vacuum as between only the applied-for and cited marks, but in light of the entire marketplace confronted by consumers.

While the Examining Attorney acknowledges that the two prior registrations are *prima facie* valid, she does not acknowledge that, necessarily therefore, the two registered marks must be construed as *prima facie* non-confusing with one another. Thus, her analysis of the issue of likelihood of confusion in the present case skips over an exceedingly important threshold question: how to properly construe the co-existence of the two prior registrations in a way that supports rather than undermines the validity of each registration. Instead, she effectively construes and applies the prior marks in a way that would compel a conclusion that they are confusing with each other and therefore invalid.

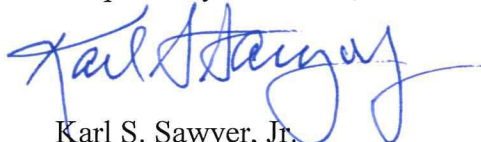
Specifically, she asserts that Applicant's mark is likely to be confused with the prior mark because the marks share the same word "BLUSH," such word is the first word in each mark, the different ending words are not distinctive ("informational"), the respective goods are the same or related, and the channels of trade are the same, yet each and every point is equally true in a comparison between the two prior registered marks. Contrary to the Examining Attorney's analysis, to properly construe and apply the prior registrations in a way that would support them as non-confusing, these factors must be an insufficient basis to find likely confusion and it must be another or other factor(s) that outweighs these factors.

The factor -- indeed, the only factor -- that points to a finding of no confusion as between the two prior registrations is their differing ending terms "BY DESIGN" and "COLLECTION". The presence of these terms in the two prior marks impart visual, phonetic and connotative differences which distinguish the two marks and mitigate against confusion. In turn, the present mark has an equally differentiating ending term "FOR HER" which compels the same finding of no likely confusion with either of the prior marks.

The above analysis as advanced by the present Applicant is not just argument in favor of Applicant's applied-for mark in this case. As a fundamental matter of policy, the public is entitled to rely upon the registration records of the USPTO to understand and ascertain the line between confusing and non-confusing marks and necessarily the public is entitled to as consistent an application of the test as is possible. The reliability of the registration system is undermined when Examining Attorneys dismiss or effectively ignore the co-existence of prior registrations upon the dodge that "prior decisions and actions of other trademark examining attorneys ... have little evidentiary value and are not binding upon the USPTO or the Trademark Trial and Appeal Board."

Date: June 14, 2016

Respectfully submitted,



Karl S. Sawyer, Jr.
Nelson Mullins Riley & Scarborough LLP
Bank of America Corporate Ctr., 42nd Floor
100 North Tryon Street
Charlotte, North Carolina 28202
Phone: (704) 417 4039
Fax: (704) 377 4814
Email: karl.sawyer@nelsonmullins.com
--Attorney for Applicant